IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24-09-2007

CORAM :

THE HONOURABLE MR.JUSTICE A. KULASEKARAN

W.P. No. 26376 of 2007
and
M.P. No. 1 of 2007
-o-

M. Srinivasa Rao .. Petitioner

Versus

The Assistant Commissioner of
Income Tax
Circle XIV, 6th Floor, New Block
No.121, Mahatma Gandhi Road
Chennai - 600 034 .. Respondent

Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus as stated therein.

For Petitioner : Mr. C.V. Rajan
For Respondent : Mr. N. Muralikumaran
Senior Standing Counsel for
Income Tax

ORDER

The petitioner has filed the above writ petition praying for a Writ of Certiorarified Mandamus to call for the records of the respondent in PAN:AAQ PsS9354S/AY 88-89 & 89-90/B.R. XIV dated 23.07.2007 and quash the notice dated 23.07.2007 and direct the respondent to grant the refund claimed by the Petitioner with interest for the assessment year 1989-1990.

2. The petitioner is an assessee under the Income Tax Act. The original assessment for the assessment year 1989-1990 was made on 28.02.1992 on a total income of Rs.4,20,170/-, which was accepted except for the addition of Rs.3,96,000/-, which was alleged as unexplained amount under the head other sources, in which the respondent department has claimed that a search was conducted in 1988, based on seizure of a receipt of a demand draft for Rs.3,96,000/- obtained from Vijaya Bank, Triplicane Branch, Chennai on 25.04.1988 in favour of M/s. S.M.S. Gardens, Coimbatore, the petitioner has explained that the said amount represented the sale proceeds of materials like furniture, fixtures, kitchen utensils etc., of Woodlands Hotel, Coimbatore along with the sale of the hotel itself for and on behalf of S.M.S. Gardens. In the original assessment made on 28.02.1992, the respondent disbelieved the

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explanation offered by the petitioner and made an addition of Rs.3,96,000/- as unexplained income and assessed the same under the head other sources. The said addition was confirmed by the Commissioner of Income Tax (Appeals). Further appeal in I.T.A. No. 646/MDS 1993 filed by the petitioner before Income Tax Appellate Tribunal was allowed by an order dated 09.07.2001, however, the Tribunal remanded it to the Assessing Officer for fresh consideration, after holding an enquiry regarding the entry in the trial balance of S.M.S. Garden receiving Rs.3,96,000/- from one Periyaswamy towards sale of old furniture and fixtures at Rs.3,96,000/- and whether this amount was really given by the petitioner or Periyasamy. It is the further case of the petitioner that after the order of the Tribunal, the respondent has not taken any action for holding an enquiry for passing fresh assessment order with regard to addition of Rs.3,96,000/-. The petitioner's bank account was attached, he requested the respondent by letters dated 24.12.2001 and 27.06.2003 for lifting the attachment of bank accounts which was made prior to the order dated 09.07.2001 of the Tribunal, but the respondent has not responded to the same. Again, the petitioner has sent a representation dated 20.07.2004 calling upon the respondent to refund the amount of Rs.1,88,284.06 relating to the assessment year 1989-1990 with interest, for which also there was no reply from the respondent. The petitioner in his representation has mentioned that he is a senior citizen and inspite of his repeated representation, he has not received any reply or refund of the amount.

3. While things are such, the respondent sent the impugned communication dated 23.07.2007 alleging that the Tribunal did not set aside or cancel the original assessment and therefore the time limit prescribed under Section 153 (2A) of the Income Tax Act is not applicable for passing a fresh assessment order and called upon the petitioner to furnish certain details and documents, which according to them they are empowered under Section 153 (3) of the Income Tax Act, 1961.

4. The learned counsel appearing for the petitioner submitted that even assuming sub-clause 3 of Section 153 of the Income Tax Act is applicable to the facts of the case on hand though no time limit is prescribed, if at all, such proceedings could be initiated within a reasonable time, whereas, in this case, the impugned communication was issued after a lapse of six years, hence, the same is liable to be quashed.

5. The learned Additional Government Pleader appearing for the respondent submitted that the proceedings are initiated pursuant to the direction or finding of the Tribunal, hence, sub-clause 3 of Section 153 of the Income Tax Act alone is applicable and in such event, no time limit is contemplated, hence, the impugned communication is sustainable in law and prayed for dismissal of the writ petition.

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6. This Court carefully considered the arguments made by the counsel on either side and perused the material records placed.

Considering the facts and circumstance of the case, this Court is of the view that Section 153 (3) of the Act is applicable to the issue involved in this case.

7. No doubt, under Section 153 (3) of the Act, time limit is not prescribed, but the same cannot be presumed that the respondent is empowered to initiate action even after lapse of several years. Admittedly, in this case, after the Tribunal's order, the petitioner has made several representations in respect of refund of amount on various occasions as mentioned above, but the respondent has not given any reply. The petitioner has also approached the Income Tax Ombudsman, Chennai by a petition dated 22.03.2007 for redressing his grievance of non-payment of refund. After the intervention of the Ombudsman, the said request of the petitioner was met by the respondent. The respondent not even mentioned in their counter affidavit on what date the order of the Tribunal was received by them. It is alleged by the respondent that due to restructuring of jurisdiction and frequent change of incumbents, enquiry was not commenced immediately in this case. Except the said bald averment, hardly any explanation, which is worth of consideration furnished by the respondent to explain the delay of six years. No doubt recovery of tax is essential to raise revenue and bring about certain economic and social results. But for the same, that alone cannot be the reason for allowing the delay in initiating proceedings against the petitioner. Hence, this Court is of the considered view that though no time limit is prescribed for exercise of power under a statute, it should be exercised within a reasonable time as held by the Honourable Supreme Court in the below mentioned decisions:-

i) (Mohamad Kavi Mohamad Amin vs. Fatmabai Ibrahim) (1997) 6 Supreme Court Cases 71 wherein in Para 2, it was held thus:-

> 2. .....In this connection, on behalf of the appellant reliance was placed on a judgment of Justice S.B. Majmudar (as he then was in the High Court of Gujarat) in *State of Gujarat* v. *Jethmal Bhagwandas Shah* disposed of on 1-3-1990, where in connection with Section 84-C itself it was said that the power under the aforesaid section should be exercised within a reasonable time. This Court in connection with other statutory provisions, in the case of *State of Gujarat* v. *Patil Raghav Natha* and in the case of *Ram Chand* v. *Union of India* has impressed that where no time-limit is prescribed for exercise of a power under a statute it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the present case, the suo motu power under Section 84-C of the Act was not exercised by the Mamlatdar within a reasonable time. Accordingly, the appeal is allowed. The impugned orders are set aside. No costs."

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ii) (*Ram Chand v. Union of India, (1994) 1 SCC 44* wherein in Para No.14, it was held thus:-

> 14. .....It is settled that in a statute where for exercise of power no time-limit is fixed, it has to be exercised within a time which can be held to be reasonable. This aspect of the matter can be examined in the light of second proviso to Article 31-A of the Constitution, which in clear and unambiguous terms prohibits making of any law which does not contain a provision for payment of compensation at a rate, which shall not be less than the market value thereof. The Act is consistent with the second proviso to Article 31-A, because it provides for payment of compensation at the market value of the land acquired. But, whether the constitutional and statutory requirement of the payment of the market value to the persons, whose lands have been compulsorily acquired, is not being circumvented and violated by keeping the land acquisition proceedings pending for more than a decade and half, without making the awards and paying the compensation, which has been pegged to the dates of notifications under sub-section (1) of Section 4 of the Act, which in the present cases had been issued 14 to 21 years before the making of the awards. If a person is paid compensation in the year 1980/1981 at the market rate, prevailing twenty years before, will that be compliance of the constitutional and statutory mandate? Ignoring the escalation of the market value of the lands, especially near the urban agglomeration or metropolitan cities, will amount to ignoring an earthquake and courts can certainly take judicial notice of the said fact. The interest and the solatium, which have to be paid under the provisions of the Act, are linked with the market value of the land with reference to the date of the notification under sub-section (1) of Section 4 of the Act. If a decision had been taken as early as in the year 1966, by issuance of declarations under Section 6, that the lands belonging to the different cultivators, who held those lands within the ceiling limit for cultivation, were needed for public purpose, respondents should have taken steps for completion of the acquisition proceedings and payment of compensation at an early date. In the present cases, unless a justification is furnished on behalf of the respondents, can it be said that the statutory power of making an award under Section 11 has been exercised within a

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reasonable time from the date of the declaration under Section 6? Due to escalation in prices of land, more so in this area, during the preceding two decades, in reality, the market rate, on the date of the notification under Section 4(1) is a mere fraction, of the rate prevailing at the time of its determination in the Award."

8. When we look into the facts of the case in one other angle, whether on the part of the respondents there was a due diligence exercised in order to avail benefit. In this case, the petitioner has made several representations to the respondent for refund of the amount, inspite of those representations, the respondent has not taken any efforts to proceed under Section 153 (3) of the Act.

9. A person who is not vigilant about his right must explain every day delay. As mentioned above, the respondent has not explained the delay satisfactorily and the delay of six years is inordinate and unexplained. Hence, this Court is of the considered view that though time limit is not prescribed under Section 153 (3) of the Act, the impugned proceedings initiated by the respondent after a lapse of six years cannot be allowed to continue, hence, the impugned order is quashed. The writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Assistant Commissioner of
Income Tax
Circle XIV, 6th Floor, New Block
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+1cc to Mr.N.Muralikumaran,Advocate Sr 59505
+1cc to Mr.C.V.Rajan, Advocate Sr 59288

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